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9 **IN THE SUPREME COURT**  
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-19-0013

12 **PETITION TO MODIFY RULES**  
13 **5.4, 7.2, AND 7.4, ARIZONA**  
14 **RULES OF CRIMINAL**  
15 **PROCEDURE**

16 **COMMENT OF**  
17 **THE ARIZONA PROSECUTING**  
18 **ATTORNEYS' ADVISORY**  
19 **COUNCIL**

20 **I. BACKGROUND OF PETITION**

21 The Maricopa County Attorney has identified what may have been an  
22 unintended consequence of the revisions to the Arizona Rules of Criminal Procedure  
23 adopted by R-17-0015, effective April 2, 2018. To address this consequence, the  
24 Maricopa County Attorney has filed a petition to amend Rules 5.4(a), 7.2(b), and  
25 7.4(b)(3). The effect of these amendments would be to reduce the duplication of  
efforts in holding identical hearings, currently required by the existing rules, within  
days of each other. The Arizona Prosecuting Attorneys Advisory Council (APAAC)  
has considered this petition and supports it.

## II. DISCUSSION/ANALYSIS

### A. Bail Eligibility Determination of “Proof Evident, Presumption Great” is Sufficient to Support Probable Cause.

For those defendants charged with an offense that is not eligible for bail, a bail eligibility hearing must be conducted within seven days of the initial appearance. Ariz. R. Crim. P. 7.2(b)(4)(B). At this hearing, the court must make a determination that “the proof is evident or the presumption great” that the defendant committed the charged offense(s). Rules 7.2(b)(1), (b)(2)(A). If the court does not find “the proof is evident or the presumption great,” it must then determine whether there is probable cause to believe that an offense was committed, and by the defendant. Rule 7.2(b)(4)(C). The parties may, but are not required to, stipulate that a probable cause determination at the bail eligibility hearing satisfies the requirements of Rule 5 (“Preliminary Hearing”). *Id.*

Under Rule 5, a defendant held in custody has the right to a preliminary hearing within 10 days of the initial appearance. Rule 5.1(a). If the court does not make a probable cause determination at the bail eligibility hearing, or the parties have not stipulated that a probable cause determination at the bail eligibility hearing satisfies the requirements of Rule 5, the court must then schedule a preliminary hearing. Rule 7.2(b)(4)(C). In effect, a *second* evidentiary hearing, addressing identical issues as the bail eligibility hearing, must be held within days of the bail

1 eligibility hearing. The effect of these rules creates a duplication of efforts on the  
2 part of the court, the parties, and law enforcement in holding separate but identical  
3 hearings addressing the same issues within days of each other.  
4

5 Petitioner submits that a determination of “the proof is evident or the  
6 presumption great” is the equivalent of a probable cause determination. Therefore,  
7 Petitioner has proposed amendments to Rules 5.4(a), 7.2(b), and 7.4(b)(3) which will  
8 eliminate the duplication of efforts from hearings held within days of each other and  
9 will save time and expense without any negative impact on a defendant’s rights.  
10

11 The meaning of the phrase “proof is evident or the presumption great” is not  
12 defined by Arizona statutes. *Simpson v. Owens (Simpson I)*, 207 Ariz. 261, 270, ¶  
13 28 (App. 2004). However, the meaning of the phrase “is explained in the case law  
14 of Arizona and other states.” *Id.* In analyzing the ‘proof evident, presumption great’  
15 standard in A.R.S. § 13-3961(A), *Simpson I* rejected a “clear and convincing  
16 standard” and held it to have its own standard:  
17  
18

19 We conclude that the phrase “proof is evident, or presumption great”  
20 provides its own standard: The State’s burden is met if all of the  
21 evidence, fully considered by the court, makes it plain and clear to the  
22 understanding, and satisfactory and apparent to the well-guarded,  
23 dispassionate judgment of the court that the accused committed one of  
24 the offenses enumerated in A.R.S. § 13-3961(A). In that case, bail must  
25 be denied. The proof must be substantial, but it need not rise to proof  
beyond a reasonable doubt.

*Simpson I*, at 274, ¶ 40. Over a decade later, the Arizona Supreme Court repeated

1 this standard, finding it to be a substantial one. *Simpson v. Miller (Simpson II)*, 241  
2 Ariz. 341, 346, ¶ 16 (2017) (“The ‘proof evident or presumption great’ standard is  
3 robust.”) The Court reiterated that in such a hearing, the defendant had the right to  
4 have counsel appointed and to cross-examine witnesses. *Id.*

6 By contrast, “probable cause” is certainly something less than proof evident  
7 or presumption great. Probable cause exists when a person of reasonable caution  
8 would believe a crime was committed based on reasonably trustworthy information;  
9 it is a practical and common-sense standard that depends on the totality of the  
10 circumstances. *State v. Sisco*, 239 Ariz. 532, 535, ¶ 8 (2016); *State v. Hoskins*, 199  
11 Ariz. 127, 137-38, ¶ 30 (2000). For a finding of probable cause, a magistrate must  
12 find that there exists “such a state of facts as would lead a man of ordinary caution  
13 or prudence to believe, and conscientiously entertain a strong suspicion of the guilt  
14 of the accused.” *Hafenstein v. Burr*, 92 Ariz. 321, 322 (1962), quoting *Dodd v.*  
15 *Boies*, 88 Ariz. 401, 357 P.2d 144, 146. This is something less than the “substantial”  
16 proof, not rising to proof beyond a reasonable doubt, as required for the “proof is  
17 evident or the presumption great” determination. *Simpson I*, ¶ 40.

21 Petitioner has proposed amending the criminal rules so that a determination  
22 of ‘proof is evident or presumption great’ at a bail eligibility hearing satisfies the  
23 Rule 5 requirement of a probable cause determination at the preliminary hearing,  
24 without the need for a stipulation between the parties and without the need for  
25

1 separate probable cause determinations. APAAC supports this proposal. This  
2 would harmonize the two rules and eliminate the inefficiencies in holding separate  
3 evidentiary hearings (bail eligibility and preliminary) within several days of each  
4 other where substantially identical witnesses and information is presented.  
5

6 Notably, because the State may sometimes seek a determination of ‘proof is  
7 evident or presumption great’ on *less* than all charges contained in a complaint, the  
8 proposed rule amendments give the State the *option* of applying the findings from  
9 the bail eligibility hearing to the Rule 5.4 probable cause finding.  
10

11 **B. Continuance of Bail Eligibility Hearing for Extraordinary**  
12 **Circumstances.**


13 Petitioner finally seeks to allow for a continuance of the bail eligibility hearing  
14 at the court’s discretion due to “extraordinary circumstances.” APAAC supports  
15 this proposal. Currently, only a defendant may move for a continuance of the bail  
16 eligibility hearing. Rule 7.2(b)(4)(B). However, unexpected situations, as described  
17 in the petition, will occasionally occur, and the rule must be flexible enough to  
18 accommodate a State’s motion under “extraordinary circumstances,” which will  
19 allow the trial court to exercise its discretion in considering a defendant’s rights as  
20 well as public safety protections.  
21

22  
23 **III. CONCLUSION**

24 The Arizona Prosecuting Attorneys’ Advisory Council supports the proposals  
25

1 outlined in petition R-19-0013. The proposed rule amendments would eliminate the  
2 inefficiencies and duplication of efforts currently existing in the rules governing bail  
3 eligibility hearings and preliminary hearings. Nothing in the proposed rules would  
4 impact the rights of a defendant being held in custody to have a bail eligibility  
5 hearing or preliminary hearing.  
6

7 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of March, 2019.  
8

9 

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11 Executive Director

12 Arizona Prosecuting Attorneys'

Advisory Council

13 Electronic copy filed with the  
14 Clerk of the Arizona Supreme Court  
15 this 18 day of March, 2019.

16 By: 